No. 392.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE TERRITORY OF ALASKA AND JUNEAU HARDWARE CO., A CORPORATION, APPELLANTS,

v.

JOHN TROY, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF ALASKA, APPELLEE.

BRIEF FOR APPELLEE.

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AUTHORITIES CITED.

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ARGUMENT FOR APPELLEE.

It is a novel and fascinating experience to explore virgin territory in the construction of the Federal Constitution. Nearly all of that great document has been plowed by successive decisions of this court, until most constitutional questions turn not so much upon the meaning of the words of the original document as upon the meaning of the judicial interpretation of those words. This is inevitable, for Chief Justice Marshall pointed out in an early period that the Constitution was little more than a working plan for an edifice that was to endure forever, and that, while it must guide the master builders who in the future would erect the superstructure in conformity with the original plan, it could not express the various means by which a design was to be carried out. To

quote his own language in the great case of *McCulloch* v. *Maryland* (4 Wheat. 316):

> This provision is made in a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should in all future times execute its powers would have been to change entirely the character of the instrument and to give it the properties of a legal code.

Thus, in the evolutionary interpretation of the Constitution, its present-day interpreters quite naturally are more concerned with the superstructure of judicial interpretation than the foundation of the original text, which the superstructure has almost hidden from view.

In this case, however, the court is called upon to interpret a clause of the Constitution which has rarely been interpreted for any purpose, and, so far as the industry of counsel discloses, has never been interpreted in its application to the question now under consideration. That clause is:

> No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

Under this clause, the question in the instant case is whether such a prohibition of preferential terms to any port of a "State" includes the port of a Territory, and, as stated, this precise question has

apparently never been before decided by this court, although in the Insular cases (*Downes* v. *Bidwell*, 182 U. S. 244; *De Lima* v. *Bidwell*, 182 U. S. 1) and in the Alaska License cases (*Binns* v. *United States*, 194 U. S. 486) reference was made to it in the discussion of the question as to how far the provision of the Constitution as to uniformity of taxation applied to Territories, incorporated or unincorporated.

The question in the instant case turns upon the precise meaning to be given to the word "State." Was it merely a description of any geographical part of the United States, or did it refer to the States which either formed the Union or were subsequently admitted into the Union, as distinguished from Territories which had not been admitted to the full privileges of the State?

It can hardly be disputed that the framers of the Constitution clearly distinguished between the "States" and the "United States" and the "Territories." Its whole history shows that its great purpose was to determine to what extent the sovereign States which formed the Confederation would surrender a part of their sovereignty. And, in this wonderful adjustment of the Federal Government, which they were creating, to the States, rights, powers, and obligations were created with reference to the States as against the Federal Government and with reference to the Federal Government as against the States.

Let me first consider each reference in the Constitution to the States, and consider how far, as to each

provision, the word "State" can be regarded as inclusive of the Territories. They are as follows:

Article I, section 2, provides for a House of Representatives to—

> be composed of members chosen every second year by the people of the several *States*, and the electors in each *State* shall have the qualifications requisite for electors of the most numerous branch of the *State* legislature.

The next paragraph provides that no person shall be a Representative unless he shall—

> when elected be an inhabitant of that *State* in which he shall be chosen.

The next clause provides that Representatives and direct taxes shall be apportioned "among the several *States*" which may be included within this Union, and it is provided that "each *State* shall have at least one Representative"; and there follows a specific and temporary provision as to the number of Representatives to be allotted at the beginning to the States, which originally created the United States.

Section 3 provides that the "Senate of the United States shall be composed of two Senators from each *State*."

It is then provided that no person shall be a Senator who is not, when elected—

> an inhabitant of that *State* for which he shall be chosen.

Section 4 provides that the times, places, and manner of holding elections for Senators and Repre-

sentatives shall be prescribed in each *State* by the legislature thereof.

In all these clauses the word "State" is plainly exclusive of a Territory.

Section 8 provides that Congress shall have power to—

> levy taxes; but all duties, imposts, and excises shall be uniform *throughout the United States*.

The court will note the significant change of phraseology. It does not state that the duties, imposts, and excises shall be uniform throughout the several States, but "throughout the United States," and therefore this court held in the Insular cases and the supplemental decisions that this clause, with respect to uniformity of taxation, applied not merely to the States, but to such Territories as had been "incorporated" into the Union. It is therefore clear that the term "the United States," comprises the whole of what Chief Justice Marshall called "the American empire," whether the constituent part be a State or a Territory.

The next is the famous "commerce clause," in which the power is given to Congress to regulate commerce—

> with foreign nations and among the several *States* and with the Indian tribes.

"Among the several States" imported a sphere of power that was in part beyond the State, and the words "and with the Indian tribes", most of which then lived in the Territories, clearly shows that power

was given to the Congress to regulate all commerce, except that which was wholly within a State. Hence, commerce with the Territories is expressly included in this grant of power.

The next paragraph provides for the establishment of a—

> uniform rule of naturalization and uniform laws on the subject of bankruptcy throughout the United States.

Here again, observe that they did not refer to the States as such, but the whole nation, as a whole, is the subject of the power.

The next provision refers to the organization of the militia, and it contains a reservation "to the *States*, respectively," of the appointment of the officers.

Here, the word "State" is less limited than the United States.

The next clause provides for a seat of government which may be acquired "by cession of particular *States*," and the power to purchase within a State lands for public purposes, "by the consent of the legislature of the State."

Here, again, the word "State" is plainly exclusive of the word "Territory;" for the Government, under its broad power to govern the Territories, did not need any such cession.

The next clause prohibits Congress, until the year 1808, from limiting the power "of a State" to regulate the migration or importation of persons into their domain; and this, of course, plainly has no

reference to the Territories, over which the Federal Government had plenary power.

The next clause provides:

> No tax or duty shall be laid on any article exported from any *State*.

Here again, the word "State" clearly refers to the States of the Union and not to the Territories.

Then follows the clause now under consideration, in which the Constitution provides that no preference shall be given "to the ports of one *State* over those of another."

If they had intended this provision to refer to the Territories, would not the clause, having in mind the constant distinction between the United States and the States, have read?

> No preference shall be given by any regulations of commerce or revenue to any port in the United States.

Such, however, is not the language. It is to the ports of "one State over those of another," and this is emphasized by the additional provision that—

> vessels bound to or from one *State* [shall not] be obliged to enter, clear, or pay duties in another.

Section 10 then provides that "no State" shall do various things, such as enter into treaties of alliance, grant letters of marque and reprisal, coin money, emit bills of credit, make legal tender, pass bills of attainder or *ex post facto* laws or law impairing the obligation of contracts, or grant any title of nobility.

Obviously, this clause could have no reference to the Territories; for, as Congress was given by the same Constitution plenary legislative power over the Territories, a prohibition that intended to prohibit Congress from doing the acts enumerated would have been worded very differently.

The next two sections provide that

> no *State* shall, without the consent of Congress, lay any import or duties on imports or exports,

and that—

> no *State* shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In all these cases it is quite plain that the inhibition was upon the powers of sovereign States, and that it had no reference to a Territory, over which no such prohibition was necessary, as the Congress had plenary power of legislation with reference to them.

Passing now to Article II of the Constitution: The first section relates to the manner of selecting a President, and provides, in substance, that each "*State*" shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.

Here again it is obvious that the word "State" is exclusive of a Territory.

Section 2 provides that the President shall be commander in chief of the Army and "of the militia of the several *States*" when called into actual service of the United States.

Here again there can be no suggestion that "State" means the Territories, for the Federal Government needs no power to organize a militia in a Territory and to call it into service.

Article III relates to the judicial power of the United States, and, *inter alia*, confers judicial power to—

> controversies between two or more *States;*—between a *State* and citizens of another *State;*—between citizens of different *States;*—between citizens of the same *State* claiming lands under grants of different States, and between a *State*, or the citizens thereof, and foreign States, their citizens or subjects.

Here again there is no question that the word "States" refers to the constituent States; for the judicial power over the Territories is conferred by another clause of the Constitution and is plenary.

The next clause provides that the trial of all crimes "shall be held in the *State* where the said crime shall have been committed."

In the case of *Thompson v. Utah* (170 U. S. 343), there are some *obiter dicta* which might seem to indicate that Article III, section 2, with reference to the place of criminal trials, applied as well to the Territories as to the States, but that decision was right-

fully decided upon the sixth amendment to the Constitution, which provided that—

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

It was therefore not necessary to decide that Article III, section 2, referred as well to a Territory as to a State, although it might well be the fact, inasmuch as the obvious purpose of that section was not so much to distribute power between States and Nation as to establish an inviolable and personal right to trial by jury. That this distinction between the distribution of governmental power and the adjustment of the machinery of our dual form of government, on the one hand, and the guaranty of *personal* rights, moving to the individual citizen directly, on the other, was the controlling reason for the decision is shown by the quotation in the opinion of the previous opinion of this court in *Mormon Church* v. *United States* (136 U. S. 1). In that case this court, after affirming in the broadest way the plenary power of the Federal Government over the Territories, added:

> Doubtless Congress, in legislating for the Territories, would be subject to those *fundamental* limitations in favor of *personal* rights which are formulated in the Constitution and its amendments; but these limitations would exist rather *by inference* and the general spirit of the Constitution from which Congress derives all its powers than by any express and *direct application* of its provisions.

In other words, this court held—and has always held, before and since—that in the matter of the fundamental personal rights of the individual it did not matter where he was under our flag, and his personal rights were safeguarded by the pertinent provisions of the Constitution and the amendments.

It is quite obvious that the economic question as to how Congress shall regulate foreign and interstate commerce by regulating ports of entry is not, in any true sense, a question of personal right. *It is an economic and political question,* which concerns States and not individuals. So far as the States are concerned Congress may not, under its power to regulate foreign commerce, give preference by direct provision to the ports of one State over thase of another—

> What is forbidden, is not discrimination between individual ports within the same or different States, but discrimination between States. (*Pennsylvania* v. *Wheeling & B. Bridge Co.*, 18 How. 421, 435.)

The remainder of the clause—

> Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another—

shows also that this clause of the Constitution was placed there for the protection of the States. The immunity from discrimination is a reserved right on the part of the constituent States and does not pertain to individual ports, much less to individual persons.

Outside of the States and in the Territories and colonial dependencies of the United States, the question of uniform treatment of ports of entry is one of governmental policy, which violates no right of any individual, but which simply regulates commerce as the political or economic interests of the nation may determine.

In *Callan* v. *Wilson* (127 U. S. 540) it was also held that, having regard to Article III of the Constitution and the sixth amendment to the Constitution, a citizen of the District of Columbia had the same right to a trial by jury as the citizen of a State; but here again this conclusion was reached because, as stated by this Court—

> There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the Constitutional guaranties of life, liberty, and property—especially of the privilege of trial by jury in criminal cases.

In other words, the decision was based upon the reasoning that, where the Constitution guarantees to individuals and not to political entities, like States, fundamental personal rights, such provisions apply equally to the States and Territories.

Turning now to Article IV, with the exception of one paragraph, which deals specifically with the Territories, it obviously refers only to the States of the Union. Thus, section 1 provides that—

> full faith and credit shall be given in each *State* to the public acts, records, and judicial proceedings of every other *State*.

Section 2 provides that the—

> citizens of one *State* shall be entitled to all the privileges and immunities of the citizens in the several *States*.

It is next provided that fugitives from any State who may "be found in another *State*" shall, on demand of the executive authority of the State from which they have fled, be delivered up to be removed to the State having jurisdiction of the crime. This could only refer to such sovereign political entities as the States were, and not to Territories, which were virtually colonial dependencies.

The next clause provides that fugitive slaves shall be surrendered to the "States" where they are property.

The next section provides that new States may be admitted by the Congress into the Union; but that no new "State"

> shall be formed or erected within the jurisdiction or any other *State*, nor any *State* be formed by the junction or two or more *States* or parts of *States*, without the consent of the legislatures of the *States* concerned, as well as of Congress.

Section 4 provides that the United States shall guarantee to every "State" in this Union a republican form of government, and shall protect them against domestic violence

> on application of the legislature or of the executive.

That all these provisions relate exclusively to the States as the constituent partners in a great compact is clearly shown, when, in that article, the Constitution clearly distinguishes between States and Territories by a sweeping delegation of power to Congress over the "territory" of the United States. It provides:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the *territory* or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular *State*.

The court will observe that, in this section, the Territories are treated as "property belonging to the United States," and not as members of the constitutional partnership. There is no suggestion of any limitation of federal power over the "territory" nor of any right by the States to control this or any "property" of the United States. The reservation that "nothing in this Constitution shall be construed so as to prejudice any claims of the United States or of any particular State" referred to the fact that, when the Constitution was adopted, there were many

conflicting claims by the various States to the so-called Northwest Territory, and as the boundaries of the various cessions by the several States to the General Government had not been ascertained, there were conflicts between the United States, to whom vast stretches of unexplored territory had been ceded, and the States which claimed them, respectively. These questions of territorial adjustment were to be left for future adjustment to the extent that they had not already been solved by the cessions to the Federal Government by different States of their conflicting claims.

To the extent, however, that any Territory was clearly recognized as the "territory" of the United States, there was given to Congress plenary power, not merely to govern them, but even "to dispose of them," without reference to the powers of the States. *Thus we see that in the Territorial clause of the Constitution there was a clear distinction made between three entities—(1) "the particular States," (2) "the United States," and (3) "the territory belonging to the United States."*

Reading this clause, which gave exclusive power to the Federal Government to determine not merely the government but the ultimate fate of the Territories, together with all preceding sections, which gave peculiar rights and imposed peculiar obligations upon the various "States," it is quite clear that the framers of the Constitution never intended, in conferring rights and immunities upon the States,

to confer them as a vested constitutional right upon the Territories.

Article V provides for the amendment of the Constitution upon the initiative of "two-thirds of the several *States*," and only to become valid when ratified "by the legislatures of three-fourths of the several *States*."

Here, again, there can be no contention that the word "States" included Territories, and, as the Territories, even when organized, are never consulted with respect to the propriety of an amendment to the Constitution, it clearly shows the plain distinction between them with respect to the constitutional compact.

Article IV provides for the supremacy of the laws of the United States, and contains reference to the fact that the judges "in every *State*" shall be bound by the Constitution, and that the "members of the several *State* legislatures, and all executive and judicial officers," shall take an oath to support the Constitution.

Finally, Article VII makes the ratification of the Constitution to depend upon the favorable action "of the conventions of nine *States*," which obviously excluded the Territories.

I have thus shown that, in construing the Constitution, the term "the State," or "the several States," etc., has a precise and definite signification, and that the word "Territory" has a similarly precise meaning. To accept the contention now urged in the present case in the able brief of the learned attorney

general of Alaska would do violence to this clear distinction which the Constitution itself has made.

In considering the word "State" in the Constitution, there is also a clear and distinct difference between the meaning of the word "State" in the original Constitution, which concerned itself almost wholly with the distribution of governmental powers between the Federal Government and the States, and the amendments to the Constitution, the first ten of which were intended as a bill of rights, to guarantee the liberty of the individual.

I have not reviewed the first ten amendments to the Constitution; but it is quite obvious that, in so far as they sought to safeguard the inviolable rights of the individual, they referred to the citizens of Territories, as well as to those of the States.

Had the Constitution provided that no preference shall be given to any port "throughout the United States," a very different question would have arisen; but it is well known that the purpose of this provision was to allay the alarm of the various States, if the plenary power over foreign commerce was granted to the Federal Government. Many States feared that if Congress had full power to regulate foreign commerce, that it could so use the power as to build up one port in a given State to the prejudice of another port of another State, and, in the absence of such a restriction, this unquestionably could have been the result. The illustrations used in the discussions which preceded the adoption of this clause

show that, if it were not adopted, it would mean that Congress could pass a law requiring all foreign vessels which were bound for Baltimore to put in at Norfolk, and in that way great prejudice could be done to the port of Baltimore. To avoid such discrimination in favor of the ports of one State as against the ports of another State, the power of Congress over foreign commerce was limited by a reservation that no such preference should be given. In other words, the sovereign States, many of which depended for their prosperity upon their ports of entry, as New York upon the port of New York and Maryland upon that of Baltimore, all were desirous of reserving the right on the part of their ports of entry to equality of terms by the Federal Government.

There was an obvious reason why they did not extend this assurance of equal terms to the ports of a Territory. They did not have in mind "ports" of a Territory, *for none such existed.* The word "port," as used by them, meant a port of entry. Thus, the Standard Dictionary defines the word "port" in this sense, as:

> Any place, whether on the coast or inland, designated as a point at which persons or merchandise may enter or pass out of a country, under the supervision of the customs and other proper authorities.

The territory of the United States, which the framers of the Constitution had in mind, was the vast unexplored territory northwest of the Ohio River to the Great Lakes, most of it a wilderness and land-

locked, and in which the only communities of white men were Indian trading posts or military forts. The "territory" contained no "port" in the sense of the word in which the framers used the term. This becomes the more obvious if it recalled that the original conception of the commerce clause of the Constitution related only to commerce by vessels, whether trans-Atlantic or coastwise. It is quite clear that internal land transportation was not at first regarded as a part of the commercial power of the Union.

In 1802 the Supreme Court of Connecticut sustained a suit brought against the owner of a stagecoach engaged in transportation between Westfield, in Massachusetts, and Albany, in New York, for carrying passengers within the State of Connecticut in violation of a law of that State, which granted an exclusive right to the plaintiff to engage in such transportation. (*Perrin* v. *Sikes*, 1 Day (Conn.), 19.)

In Maryland and Virginia also the right to carry passengers had been granted as a monopoly, and it appears that these laws were construed as applying to travel between States. (McMaster's History of the American People, vol. 2, p. 60; *Conf. Conway* v. *Taylor's Executor*, 1 Black, 603.) Furthermore, as showing the view in this matter in Congress, it is said that a motion was made in the Second Congress to permit stagecoaches carrying the mails from State to State to transport passengers also, but that the motion was lost as being in violation of the rights

of the States. (McMaster's History of the American People, vol. 2, p. 60.)

The "territory" of the United States was in the heart of the American Continent, and had little access to the sea, or the great navigable rivers. Commerce, as the Fathers conceived it, did not exist in the "territory" in the sense of the transportation of merchandise. A few hardy pioneers pushed their way over the Alleghenies into the vast stretches of the Northwest Territory, and the only commerce they knew was bartering guns and powder, and beads, for the furs and game of the savage Indian tribes. The territory, therefore, which the Fathers had in mind, contained no port of entry, in any appropriate sense of the word, which could be made the subject of discriminatory treatment, and this historical fact strengthens the conclusion that the immunity from such preferential treatment had reference to the ports of entry of the various States into which the vessels of commerce came from other States and countries.

Moreover, the clear discinction of governmental power between States and Territories must constantly be borne in mind. As to the States, there was only a limited delegation of power, subject to many reservations and qualifications. As to the Territory there was a plenary power to deal with it as the property of the United States, to the extent even of "disposing" of it at the pleasure of the Federal Government.

It is true that, in the history of this clause, the clause forbidding preference was originally linked

with the clause which required uniformity of taxation "*throughout the United States,*" and it is now suggested that that fact should lead to the conclusion that the construction which is put upon the uniformity of taxation clause and which is expressly applicable throughout the whole of the United States, including its incorporated Territories, should be the same as the clause forbidding preferential treatment of ports.

This argument, however, cuts both ways. May it not be that when that master of clear arrangement and precise style, Gouverneur Morris, who was the "committee on style," separated these two clauses, he thus recognized the clear distinction between them? Certainly it is significant that in the uniformity of taxation clause, the phrase is "throughout the United States;" whereas, in the equality of port privileges clause, the phrase is "the ports of one *State* over those of another." When, therefore, different phraseology was used in these two clauses, and they were broken up into separate paragraphs, the more probable inference would be that there was a distinction between them and the distinction which I have suggested seems to me the most obvious, especially when regard is had to the territorial clause of the Constitution, which vests in the United States plenary power over the Territories.

No one disputes that if this Territory were not incorporated into the Union that the equality clause with respect to ports would not apply. Hence the appellant concedes, under the authority of the Insular

cases, that the Federal Government has power to discriminate between the ports of the States and the ports of unincorporated Territories. It is therefore not accurate to say that the prohibition against discrimination applies to the whole geographical domain of the United States, which Chief Justice Marshall called "the American empire."

Whatever may be the truth as to other clauses of the Constitution which affect the fundamental rights of individuals, there is nothing in the Constitution which suggests that it intended to make any discrimination between the ports of incorporated Territory and unincorporated Territory. What the Constitution did intend to do was to reserve to the constituent States of the Union an immunity with respect to their ports of entry from discriminatory treatment.

Before leaving the question of textual construction, care must be taken to distinguish between the language of the Constitution and the statutes which Congress, from time to time, enacts pursuant to the powers of the Federal Government. Unquestionably Congress, when in the exercise of its powers it broadly legislates for many purposes, often uses the word "State" as inclusive of Territories. Whether the former expression is inclusive of the latter in a statute must be determined with reference to each statute.

In the Constitution, however, a different rule of construction must be followed; for it is obvious that

the Constitution was not an exercise of Federal power, but was primarily a distribution of rights, powers, and obligations between the States that formed the Union and the new Government which was thus created.

I have thus far discussed the question as a matter of textual construction, and it remains to consider the argument, from the history of the Constitution, and especially the reasons which, under present conditions, should favor the construction of the clause as hereinbefore set forth.

When the Constitution was framed it is probable that its framers, even though they were of English birth and inheriting the traditions of the British Empire, did not contemplate that America would ever be a colonizing power. The ambition of the new Government for territorial domain did not stretch beyond the east bank of the Mississippi, and there probably would have been no "territory" of the United States, as distinguished from the aggregate of the constituent States, had it not been for the conflicting claims with reference to the territorial boundaries of the States after the treaty of peace.

The genius of the Anglo-Saxon race has, however, made the United States a great colonizing power. Rapidly it pushed its territorial conquests westward and southward, until the domain of the United States stretched from the Atlantic to the Pacific and from the Great Lakes to the Gulf. Until recent times that domain was continental and contiguous in its character. Subsequently, a noncontiguous Territory was

acquired, when Alaska was purchased from Russia, and for a long time it was regarded as little more than a great stretch of Arctic wildness, which was governed by little more than a military post.

Subsequently, in the year 1898, at the outbreak of the Spanish-American War, Hawaii was annexed, and, after the successful termination of that war, the United States found it necessary to annex Porto Rico and the Philippine Islands, the latter in the Orient and many thousands of miles distant from the nearest port of entry of the United States. Then arose the great question of the nature and extent of the colonial power of the United States, and, as a result of the Insular decisions and the supplementary cases affecting Hawaii and the Philippine Islands, the right of the United States to acquire Territories and to govern them as colonies was firmly established.

America had thus, in the truest sense of the term, become a world power. Its interests were both in the Orient and the Occident. It occupied in the Philippines a sphere of influence at the very gates of China. As with England, upon its vast domain the sun never sets.

It then became obvious that uniformity of legislation, which was quite practicable in continental America and with a reasonably homeogeneous population, had become impracticable when the Congress of the United States was obliged to deal not merely with its own people of continental America, but with millions of inhabitants of varying degrees of intelligence and civilization in the far-off Philippines.

A uniform rule with respect to ports of continental United States might prove wholly undesirable and even unworkable as applied to the ports of entry of the Philippine Islands. With respect to them, a special system of legislation had to be enacted to adjust the economic well-being of the Philippines to the conditions in the Orient, which environed these islands.

Chief Justice Marshall said in a passage already quoted, that the Constitution was intended "to endure for ages, and consequently to be adapted to the various crises of human affairs." Who shall say, in this period of overshadowing power, what the future territory or domain of the United States may be? The World War showed that it was impracticable for the United States to disentangle itself from the tangled skein of European and oriental politics and policies. Who can say what it may be required to do in the future ages in playing its part in the disordered affairs of mankind, as a master state of the world? Under these circumstances, would it not be most inadvisable to hold that the Constitution requires that the United States, in whatever exercise of world power it may hereafter assume, shall deal with all ports of entry which are subject to its jurisdiction with absolute equality?

If the Fathers had anticipated the control of the United States over the far-distant Philippine Islands, would they, whose concern was the reserved rights of the States, have considered for a moment a project that any special privilege which the interests of the

United States might require for the ports of entry of the several States should, by compulsion, be extended to ports of entry of colonial dependencies, living in a different civilization and having economic interests which might be wrecked by the application of the rule of equality?

In other words, provisions with respect to such ports as Boston, New York, Philadelphia, Baltimore, New Orleans, and San Francisco might well prove an intolerable burden to the port of Manila, or a regulation that would give special privileges to the port of Manila, in order to build up the economic prosperity of the Philippine Islands, might, if uniformity were required, cause lasting injury to the ports of the American continent.

In this connection, it was well said by Mr. Justice Brown, speaking for this court, in the case of *Holden* v. *Hardy*, 169 U. S. 366:

> In the future growth of the Nation, as heretofore, it is not impossible that Congress may see fit to annex Territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of the administration unchanged. It would be a narrow construction of the Constitution to require to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence

with which they had no previous acquaintance or sympathy."

The more one studies the Constitution of the United States, the more he is impressed with the surpassing and, at times, remarkably prophetic wisdom of its framers. When, in providing that the ports of one State should be given no preference over the ports of another State they were careful to leave to Congress plenary authority over the Territory, as such, they wisely gave an elasticity to the government which they were creating which enables this Government to realize its destiny as a world power.

JAMES M. BECK,
Solicitor General.

DECEMBER, 1921.

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See addendum, next page.

ADDENDUM.

The interesting question suggested in appellants' brief (pp. 22, *et seq.*) and briefly referred to in my brief (pp. 20, *et seq.*) as to the reason which impelled the framers of the Constitution to separate the clause now under consideration, with respect to preferential treatment of ports, from that which refers to uniformity of taxation, and the further question why, in the former clause, the words "of revenue" were added, when the latter provision, by its requirement of uniformity of taxes throughout the United States, effectually prevented the imposition by the Federal Government of different duties at different ports, are explained when due consideration is given to the fundamental distinction, which the men who framed the Constitution always had in mind, between a tax that was levied as a mere regulation of commerce and not for revenue and a pure revenue tax. To-day, that distinction has been almost wholly lost sight of in discussing the constitutional questions which underlay the American Revolution; and yet no distinction was more clearly recognized by the men of that era or more tenaciously adhered to.

In the constitutional struggle between the Colonies and the Crown the leaders of the colonial party did not question the constitutionality of a regulation of trade which diverted commerce from one port of the British Empire to another. Such pref-

erences were worked out, not merely by absolute prohibitions of importation, and exportation, but also by prohibitive duties; and, as long as the purpose was not to raise revenue, but merely to regulate foreign commerce of the British Empire, the constitutionality of such measures was not questioned.

The phrase "taxation without representation" had reference to taxes, which were levied upon the colonists for the purpose of revenue. Chief Justice Marshall, in the great case of *Gibbons* v. *Ogden* (9 Wheat. 1, 12), referred to this distinction in the following language:

> It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent caution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the War of our Revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences

to the human race, as any the world has ever witnessed.

The remarks of the Chief Justice are fully borne out by history; and the classification of import duties into revenue duties and regulations of commerce lay at the basis of the American doctrine which led to the Revolutionary War. We may refer to the journals of the Continental Congress, volume 1, pages 28, 175, 176; volume 2, page 189; the examination of Dr. Benjamin Franklin at the bar of the House of Commons on February 7, 1776 (1 Bigelow's Life of Franklin, pp. 478, 479); John Dickinson's Letters from a Farmer, published in 1768, pages 15, 18–19, 37–42, 43 (note), 60, 61, 66; Dr. Franklin's letter to Joseph Galloway of February 25, 1775 (8 Spark's Franklin's Works, p. 147); John Adams's letter to Jay of July 19, 1785 (Works of John Adams, vol. 8, pp. 282, 283). The same view was maintained by the leading jurists and statesmen of the first two generations after the adoption of the Constitution; and with practical unanimity they based the protective tariff duties on the commerce clause of the Constitution. (1 Story on the Constitution, sec. 963; 2 *id.*, 1080, *et seq.*; James Madison's letter to Joseph C. Cabell of March 22, 1827 (Writings of James Madison, (Lippincott ed.), vol. 3, p. 571); his letter to Cabell of September 18, 1828 (*id.*, p. 636); Henry Clay's reply to Barbour, March 31, 1824 (Annals of Congress, p. 1994); Gulian C. Verplanck's Letter to Drayton, New York, 1831, pp. 21–23; Speech of

Thomas Smith Grimké, etc., Charleston, 1829, page 51). Mr. Grimké states that (p. 62):

> In 1790 Edmund Randolph, in his opinion to the President, states among the heads of the power to regulate commerce with foreign nations the power to prohibit their commodities, to impose or increase the duties on them.

Having in mind this distinction, let me now refer to the proceedings of the Convention of 1787 with reference to the clause in controversy.

The great grant had already been agreed upon under which the power to regulate foreign and interstate commerce was vested in the central government. Having granted it with little dissent, some of the members of the convention became concerned as to the possibilities to their States which were necessarily involved in such unlimited grant of power. As previously noted, they were quite familiar with the fact that the Lords of Trade, the bureau of the crown which governed the Colonies, had employed regulations of commerce to the great detriment of the Colonies and to the great advantage of other colonies of the Crown, and especially of the home industries of England.

Maryland was particularly concerned, as it occurred to its representatives that the grant of power to regulate commerce would make it easy for the Federal Government to require vessels bound to Baltimore to pay tribute to Virginia.

Accordingly, we find, on August 25, the following proceedings, which was the first suggestion to the Convention of the clause in controversy:

> Mr. Carroll and Mr. L. Martin expressed their apprehensions, and the probable apprehensions of their constituents, that under the power of regulating trade the General Legislature might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat; as vessels belonging or bound to Baltimore, to enter and clear at Norfolk, &c. They moved the following proposition:
>
> "The Legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, or paying duties or imposts in one State in preference to another."
>
> Mr. Gorham thought such a precaution unnecessary, and that the revenue might be defeated, if vessels could run up long rivers, through the jurisdiction of different States, without being required to enter, with the opportunity of landing and selling their cargoes by the way.
>
> Mr. McHenry and Gen. Pinckney made the following propositions:
>
> "Should it be judged expedient by the Legislature of the United States, that one or

more ports for collecting duties or imposts, other than those ports of entrance and clearance already established by the respective States, should be established, the Legislature of the United States shall signify the same to the executives of the respective States, ascertaining the number of such ports judged necessary, to be laid by the said executives before the legislatures of the States at their next session; and the Legislature of the United States shall not have the power of fixing or establishing the particular ports for collecting duties or imposts in any State, except the legislature of such State shall neglect to fix and establish the same during their first session to be held after such notification by the Legislature of the United States to the executive of such State.

"All duties, imposts and excise, prohibitions or restraints, laid or made by the Legislature of the United States, shall be uniform and equal throughout the United States."

These several propositions were referred, *nem. con.*, to a committee composed of a member from each State. The committee appointed by ballot, were, Mr. Langdon, Mr. Gorham, Mr. Sherman, Mr. Dayton, Mr. Fitzsimons, Mr. Read, Mr. Carroll, Mr. Mason, Mr. Williamson, Mr. Butler, Mr. Few.

On August 28, the committee to whom the matter was referred made the following report, as shown in Madison's Journal:

In convention.—Mr. Sherman, from the committee to whom were referred several

propositions on the twenty-fifth instant, made the following report; which was ordered to lie on the table:

"That there be inserted, after the fourth clause of the 7th section: 'Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige vessels bound to or from any State to enter, clear or pay duties in another; and all tonnage, duties, imposts, and excises laid by the legislature, shall be uniform throughout the United States.'"

On the 31st the report of the committee was taken up and the following proceedings took place:

The report of the grand committee of eleven, made by Mr. Sherman, was then taken up (see twenty-eighth of August).

On the question to agree to the following clause, to be inserted after article 7, sec. 4, "nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another"—agreed to, *nem. con.*

On the clause, "or oblige vessels bound to or from any State to enter, clear, or pay duties, in another"—

Mr. Madison thought the restriction would be inconvenient; as in the River Delaware, if a vessel can not be required to make entry below the jurisdiction of Pennsylvania.

Mr. Fitzsimons admitted that it might be inconvenient, but thought it would be a greater inconvenience to require vessels bound to Philadelphia to enter below the jurisdiction of the State.

Mr. Gorham and Mr. Langdon contended that the Government would be so fettered by this clause as to defeat the good purpose of the plan. They mentioned the situation of the trade of Massachusetts and New Hampshire, the case of Sandy Hook, which is in the State of New Jersey, but where precautions against smuggling into New York ought to be established by the General Government.

Mr. McHenry said the clause would not screen a vessel from being obliged to take an officer on board as a security for due entry, &c.

Mr. Carroll was anxious that the clause should be agreed to. He assured the house that this was a tender point in Maryland.

Mr. Jenifer urged the necessity of the clause in the same point of view.

On the question for agreeing to it—

Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, aye—8; New Hampshire, South Carolina, no—2.

The word "tonnage" was struck out, *nem. con.*, as comprehended in "duties."

On the question on the clause of the report, "and all duties, imposts and excises, laid by the legislature, shall be uniform throughout the United States," it was agreed to, *nem. con.*

On September 12, the Committee on Arrangement and Style, to whom all the tentatively adopted clauses had been referred, made its report, and it is a curious fact that, for some reason, the whole clause, including the provisions as to preferences to ports, as well as to uniformity of taxation, was omitted

from the draft. I find nothing in Madison's Journal to explain this omission.

On September 14—three days before the close of the convention—the following took place:

> On motion of Col. Mason, the words "or enumeration" were inserted after, as explanatory of "census,"—Connecticut and South Carolina, only, no.
>
> At the end of the clause, "no tax or duty shall be laid on articles exported from any State," was added the following amendment, conformably to a vote on the 31st of August, (p. 647,) viz, "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties, in another."

It will thus be seen that the clause in controversy in the instant case was, for some reason, removed from the clause which required uniformity of taxation and attached to the clause which forbade any State to impose an export duty.

These are the only references that I find in Mr. Madison's Journal.

Having in mind the distinction already referred to, which the framers of the Constitution had in mind, between a regulation of commerce, whether accomplished by an affirmative prohibition or the indirect effect of a prohibitory tax, it seems clear to me that they separated the two clauses because of this distinction. When they were referring to taxes to

be levied by the United States for the benefit of the treasury, they required uniformity "throughout the United States;" but when they were considering the possibility of discriminatory legislation, whether by taxes or otherwise, in favor of one port and against another, they wrote a different clause, and, instead of using the words "throughout the United States," they expressly provided that Congress should not impose any tax or duty upon "articles exported from any State," adding that—

> No preference shall be given by any regulations of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

It is clear, therefore, that the great purpose that they had in mind was that the Federal Government, in exercising its power to regulate foreign commerce, should not build up the port of one State, to the prejudice of another. It was, as previously suggested in this brief, the privilege of the States, as political entities, and not that of the citizens thereof.

In any one State, the Government could, in establishing its ports of entry, prefer one port to another port; but it was forbidden to discriminate between States, as such; and, as previously argued, it is inconceivable that the framers of the Constitution had in mind the ports of the territories, when no such ports existed or were even in contemplation, and when, over the territories, plenary power had been conferred upon the Federal Government.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 392.

THE TERRITORY OF ALASKA AND JUNEAU HARDWARE COMPANY, A CORPORATION, APPELLANTS,

vs.

JOHN TROY, COLLECTOR OF CUSTOMS, APPELLEE.

ADDENDUM TO APPELLANTS' BRIEF.

By what authority can Congress legislate for Alaska?

Only by virtue of the authority granted in the treaty with Russia ceding the territory to the United States.

But the authority granted by that document is not unlimited, but expressly limited. The legislation here in question is in excess of that authority.

The question now submitted is whether legislation which transcends the limitations upon the authority of Congress is valid. Is it not *ultra vires* and as such void?

In the Insular cases this Court held that, in legislating for a territory acquired from a foreign nation, the extent of the power of Congress was determined by the treaty of cession. If this doctrine be applied to Alaska, the treaty of 1867 must determine the extent of the authority of Congress over that territory.

Respectfully submitted,

JOHN RUSTGARD,
Attorney for Appellants.